BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The decision of the Circuit Court of Roane County, Tennessee, appears at page 6, of the record and is not reported.

The opinion of the Supreme Court of Tennessee reversing the judgment of the Circuit Court of Roane County, appears at page 29 of the record and is not reported.

Jurisdiction.

A. Statutory Provisions.

The jurisdiction of this Court is invoked under Judicial Code (Paragraph 237), as amended (U. S. C. A., paragraph 344, subdivision (b)).

B. Date of Judgment.

The judgment of the Supreme Court of Tennessee was entered November 23rd, 1940 (R. 33).

Rehearing was denied February the 7th, 1941 (R. 33).

C. Nature of the Case.

(a) This is a suit brought by the petitioner on behalf of herself and her minor son under the Workmen's Compensation Law of Tennessee (Code of Tennessee 1932, Sections 6851 to 6901 inclusive), to recover compensation for the killing of her husband Pearson Pyle, on February the 26th, 1938, while engaged in the line of his duty in calling a train crew for freight train No. 81, on the said Tennessee Central Railway Company running between Emory Gap, Tennessee and Nashville, Tennessee, and which train when it left Emory Gap, some 35 minutes or more after the death of said Pyle had in its makeup some six cars loaded with freight originating in one state and going to a point of final destination in another state.

(b) Question involved is, was the deceased Pearson Pyle at the time of the injury, and therefore the defendant Railway Company, engaged in interstate commerce, or in work so closely connected with it as to be a part of it, so as to exclude the defendant Company from liability under the Tennessee Workmen's Compensation Law.

D. Rulings of the Court Below.

Deemed to bring the case within the jurisdictional provisions relied on.

The Court ruled that:

(a) "The carrier doing an interstate business and that it was so engaged at the time when deceased was killed; that deceased was performing duties so closely related to interstate commerce as to be a practical part of such commerce." (Opinion, R. 29.)

Evidently a misconception on the part of the Honorable Court of both the law and the fact in the present case.

(b) "While the destination of this train, No. 81, was Nashville, an interstate point, it appears that at least six of the freight cars composing it, about one-half of the whole number making up this train, were interstate shipments, en route from originating points in other states. One car of pulp and one of coal originated at Appalachian, Virgina; one of salt at Port Huron, Michigan; one of merchandise at Spencer, North Carolina, and one at Saltville, Virginia. Now it was the crew of this train, whose duty it was to 'make up the train' and to man it, that the deceased was in the act of notifying to begin this work when he was killed. It was while performing this part of the duties devolving upon him, the particular duty of summoning and giving orders to the crew of this train made

up of these car loads of freight in the process of transportation from points in various other states to Nashville, that this employee met his untimely death. Is it possible to deny that his employer was at the time 'a common carrier doing an interstate business', and 'engaged in interstate commerce'? We think not. And, if the employer was so engaged at the time, in the very particular as to which this employee was serving, then both alike were engaged in interstate commerce. Certainly, the Railway Company was engaged in interstate commerce. It was an essential incident of transportation of these cars that they should be placed in this train after they had arrived from other states en route to Nashville. And this yard foreman was also so engaged when, acting for his company, he was notifying and directing the train crew touching their duties. If the crew of men he was notifying or signaling to act were engaged in interstate commerce—of which there can be no doubt—then the foreman or boss was also so engaged." (Opinion, R. 30-31.)

Here we find that the Court had gotten the wrong conception of the case particularly with reference to the duties of Pyle in connection with the making up and pulling out of the train No. 81. And having gotten the wrong conception of the fact applied the wrong principle of law. Pyle had nothing to do with the making up of train No. 81. That train was made up by the yard crew under the direction and supervision of F. G. Gardner the Agent and Yard Master of the defendant Railway Company at Emory Gap (R. 27). The Court overlooked the fact that the deceased Pyle was not working with any instrumentality engaged in either interstate or intrastate commerce but in the thing that he was doing at the time he was struck and killed he was doing no more than telling the other fellow what time to go to work.

(c) "With special application to the duty this deceased was at the moment of his death performing, the opinion in *Erie Railroad Co.* v. *Collins,* 253 U. S. 77, 64 L. Ed., 790, is suggestive. Holding that the employee, whose usual duty was operating a signal tower in the yards, was still engaged in interstate commerce when injured while starting up a gasoline pump for water in the railroad yards, the Court said: "It can hardly be contended that while plaintiff was engaged in the signal tower he was not engaged in interstate commerce, though he may have on occasion signaled the approach or departure of intrastate trains.' Now we have here an employee whose duty was to 'signal' the crew to man the trains; is not his connection with interstate transportation as close as if his duty were to signal the crew to move the trains? And, as indicated in the foregoing quotation, that sometimes the trains are interstate and sometimes intrastate is immaterial."

The opinion in *Vaught* v. *Railway Co.,* 148 Tenn. 379, cites and quotes from *Erie R. Co.* v. *Winfield,* 244 U. S. 170, 61 L. Ed., 1057, in which the injured employee had charge of the switching in the yard (a duty somewhat like that of the deceased in this case), and was killed as he crossed some tracks as he was leaving the yard after work. We quote this language, which has application here:

> "In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. * * * Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole. * * * His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate is therefore plain, and that his employment also extended to intrastate commerce is for present purposes of no importance." (Opinion, R. 32.)

Here is manifestly a misapplication of the principles laid down by this Court in *Erie R. Co.* v. *Winfield*, 244 U. S. 170, 61 L. Ed., 1057, and also of the case of *Erie Railroad Co.* v. *Collins*, 253 U. S. —, 64 L. Ed. 790.

(d) "We are unable to escape the conclusion that the making up and operation of this train, carrying interstate cars of freight, was connected with and a part of interstate transportation; and that the supervision or overseeing of this yard by its foreman, including services required and being performed by him in signaling its crew to assume charge of it, was work so closely related to interstate commerce as to be a part of it. *Tennessee Railroad Co.* v. *Chitwood*, 163 Tenn. 303, is clearly distinguishable on its facts and does not control here. The judgment must be reversed and the suit dismissed." (Opinion, R. 32-33.)

The reasons heretofore expressed show this reversal and dismissal of the law suit are in error.

E. Cases Sustaining Jurisdiction.

The cases which sustain the jurisdiction of this Court are:

North Carolina Railroad Company v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 S. C. R. 305.

Seaboard Air Line Railway v. *Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 S. C. R. 635;

T. St. L. & W. R. R. Co. v. *Salvin*, 236 U. S. 454, 59 L. Ed. 671, 35 S. C. R. 306. Reversing 88 Ohio St. 536;

C. R. I. & P. Ry. Co. v. *Devine*, 239 U. S. 52, 60 L. Ed. 140, 36 S. C. R. 27;

C. & O. Ry. Co. v. *DeAtley*, 241 U. S. 310, 60 L. Ed. 1016, 36 S. C. R. 564;

Union Pacific R. R. Co. v. *Huxoll*, 245 U. S. 535, 62 L. Ed. 455, 38 S. C. R. 187;

Dickinson, Receiver v. *Stiles*, 246 U. S. 631, 62 L. Ed. 908, 38 S. C. R. 415;

See also 168 S. W. 250.

Specification of Error.

THE SUPREME COURT OF TENNESSEE, ERRED IN HOLDING:

(a) That the respondent, Tennessee Central Railway Company, was engaged in interstate commerce at the time when deceased was killed; and that deceased was performing duties so closely related to interstate commerce as to be a practical part of such commerce.

(b) "Now it was the crew of this train whose duty it was to 'make up the train' and to man it, that the deceased was in the act of notifying to begin this work when he was killed."

(c) "It was while performing this part of the duties devolving upon him, the particular duty of summoning and giving orders to the crew of this train made up of these car loads of freight in the process of transportation from points in various other States to Nashville, that this employee met his untimely death."

(d) "Is it possible to deny that his employer was at time 'a common carrier doing an interstate business', and 'engaged in interstate commerce'? We think not. And, if the employer was so engaged at the time, in the very particular as to which this employee was serving, then both alike were engaged in interstate commerce. Certainly, the Railway Company was engaged in interstate commerce."

(e) "It was an essential incident of transportation of these cars that they should be placed in this train after they had arrived from other States en route to Nashville. And this yard foreman was also so engaged when, acting for his company he was notifying and directing the train crew touching their duties. If the crew of men he was notifying or signaling to act were engaged in interstate commerce,—

of which there can be no doubt,—then the foreman or boss was also so engaged."

(f) "In *Prince* v. *Nashville, Chattanooga & St. Louis Railway*, 152 Tenn., 189, the principle was applied that maintenance of a railroad right of way, used by both interstate and intrastate trains, is so much a part of interstate commerce as to exclude application of our Compensation Act. In that case the injured employee was working on the banks of the right of way. The holding would have been the same if he had been working on the tracks in this yard. And the holding would have been the same if the employee had been a section foreman, instead of a section hand. And so we think this foreman, whose duty was to "oversee" the yard—see that it was in good and safe condition—was engaged in a branch of interstate commerce."

(g) "With special application to the duty this deceased was at the moment of his death performing, the opinion in *Erie Railroad Co.* v. *Collins*, 253 U. S., 77, 64 L. Ed., 790, is suggestive. Holding that the employee, whose usual duty was operating a signal tower in the yards, was still engaged in interstate commerce when injured while starting up a gasoline pump for water in the railroad yards, the Court said: "It can hardly be contended that while plaintiff was engaged in the signal tower he was not engaged in interstate commerce, though he may have on occasion signaled the approach or departure of intrastate trains." Now we have here an employee whose duty was to 'signal' to the crew to man the trains; is not his connection with interstate transportation as close as if his duty were to signal the crew to move the trains? And, as indicated in the foregoing quotation, that sometimes the trains are interstate and sometimes intrastate is immaterial."

(h) "The opinion in *Vaught* v. *Railway Co.*, was applicable in this case and quoting from and applying the holding in

that case to this case under the theory that the duties of the employee in that case was somewhat like the duty of deceased in this case. The Court failed to distinguish between the duties of the employee in the case quoted from and the duties of the deceased in this case. In the case quoted from the employee was actually operating an engine, as engineer which was engaged in switching operations in interstate commerce while in the case at bar the deceased did no work with any instrumentality engaged in interstate commerce but was simply a foreman who told the other fellow what to do and when to go to work. A step further removed from interstate commerce than the employee in the case quoted from."

(i) "We are unable to escape the conclusion that the making up and operation of this train, carrying interstate cars of freight, was connected with and a part of interstate transportation; and that the supervision or overseeing of this yard by its foreman, including services required and being performed by him in signaling its crew to assume charge of it, was work so closely related to interstate commerce as to be a part of it. *Tennessee Railroad Co.* v. *Chitwood*, 163 Tenn., 303, is clearly distinguishable on its facts and does not control here. The judgment must be reversed and the suit dismissed."

Statement of the Case.

A full statement of the case has been given under the heading (A) in the annexed petition page 1, and is here omitted in the interest of brevity.

ARGUMENT.

Under the pleadings as made up and the agreement of the parties at the trial of this case in the Circuit Court of Roane County, Tennessee there was left only one question

to be determined by the trial Court and that is "Was the deceased, Pearson Pyle, and the defendant Railway Company in the duties that the deceased was performing at the time of the accident, engaged in interstate commerce, or in work so closely associated with it as to be a part of it, so as to make the exclusion contained in Sub-Section (a) of Section 6856 apply in this case."

His Honor, Judge Pat Quinn, the trial Judge after having the case briefed by both parties and having taken the same under advisement was of opinion that the deceased and the defendant Railway Company were not engaged at the time of his injury and death in interstate commerce or in work so closely related to interstate commerce as to be a part of it. (R. 6).

The Supreme Court of Tennessee held otherwise and reversed the decree of the Circuit Court. (R. 29-34).

The Tennessee Workmens Compensation Law, Code of Tennessee Section 6856, Sub-Section (a) and the Federal Employers Liability Act, U. S. Code Title 45 Section 51 are intended to and do cover the entire field of the employees of Railroad Companies. The Federal Employers' Liability Act covering and protecting the employee while engaged in interstate commerce and the Tennessee Workmens Compensation Law covering and protecting the employee when not engaged in interstate commerce. The State Workmens Compensation Law beginning where the Federal Law leaves off and the two fit together to form a complete whole and cover the entire field.

True that in one respect the Tennessee Compensation Statute is broader than the Federal Employer's Liability Act, and that is our State Statute is made to exclude all common carriers doing an interstate business while engaged in interstate commerce, while the Federal Act applies only to common carriers by railroad, in that respect

the State Act is broader, but as the two acts apply to railroads, the one fits into the other and make a complete whole.

It is insisted by the respondent, Railway Company, that the mere fact that it is engaged in, or was engaged in, Interstate Commerce takes it from under the operation of the Compensation Statute, but in making that insistence, it fails to give effect to the last part of sub-section (a) of the said section 6856, where it states "while engaged in interstate commerce."

It is our insistence, and we think correctly so, that the thing that the railroad company is engaged in and that the employee is engaged in, at the time of the injury, determines what the character of the employment is, and whether it is at the time of the accident engaged in interstate or intrastate commerce. If the work that is engaged in by the employee, which of course is the same act as is being done by the carrier at that particular time, is interstate commerce, then the exclusion in our State Statute applies and the company is not liable, on the other hand, if it is engaged, at that particular time, in intrastate commerce, the exclusion does not apply, and they are liable under our State Compensation Statute.

> "The present law emphasizes three things which must concur before its provisions are applicable: (1) The railroad company in question must engage in interstate commerce; (2) it must, at the time of the injury in question, be engaging in that character of commerce as contra distinguished from such purely local matter as it may also engage in; (3) the injured servant must also, at the time of receiving his injury, be engaged in interstate commerce."
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> *Charleston & W. C. R. Co.* v. *Anchors,* (1912) 10 Ga. App. 322, 73 S. E. 551.

"It would seem that the Court somewhat complicates the question by the introduction of the second

item which it states must concur before the provisions of the act are applicable. In view of the decisions of the Federal Courts and of the United States Supreme Court. It would seem that the first and third are sufficient: if by the second item, the court means anything more than what is included in the third item, that the injured servant, must at the time of receiving his injury, be engaged in interstate commerce, the decision is clearly erroneous under the rule of the Federal Courts."

Bottom v. St. L. & S. F. R. Co., 179 Fed. 318.

The construction above given makes the acts being done by the employee and the employer, as both must be engaged in the same work at the time of the injury, controlling as to what both employer and employee are engaged in, whether it be interstate or intrastate commerce.

The very wording of our compensation statute shows that the Legislature contemplated more than mere doing of interstate commerce or being engaged in interstate commerce by the carrier, but that it contemplated that the particular act being done at the time of the injury must control and determine in each particular case, if it had not had that in mind there was no use or necessity for adding on the last five words in the sub-section (a), to-wit: "While engaged in interstate commerce."

If the Legislature had not had in mind that the particular act being done, at the time of the injury, should control it could have ended subsection (a) after using the expression "doing an interstate business." The adding of those last words shows clearly that the legislative intent was that the thing that was being done at the time of the injury was to determine the character of the employment as to whether the employer was doing interstate or intrastate commerce. If the employee, and under our compensation Act he must be, be engaged in the line of his duty, then the

act that he is doing, at the time of his injury, determines the thing that the employer is doing, whether it is interstate or intrastate commerce at that particular time, because the employee, being the servant of the employer and his act being the act of his master, determines the character of the work.

Pearson Pyle was working for the Tennessee Central Railroad Company and it was admitted by counsel for the Plaintiff-in-Error, Railroad Company, during the trial of this case that Pyle was on duty and in the line of his duty at the time of his injury; that being true Pyle being the employee of the Plaintiff-in-Error, Railroad Company, the Company was doing the same thing that Pyle was doing at that particular time and was engaged in the same kind of business as Pyle was engaged in, and if the thing that Pyle was doing was intrastate commerce then the Tennessee Central Railroad was engaged in intrastate commerce at that particular time and not in interstate commerce, and if that is true then the Plaintiff-in-Error Railroad Company would be amendable under the law and liable for compensation. In so far as our compensation statute in Tennessee applies to common carriers by railroad we respectfully submit that the exclusion in our statute means exactly the same thing as the inclusion in the Federal Employers' Liability Act.

We will now enter into a discussion and presentation of authorities as to whether the thing that was being done at the time Pyle was struck and killed was intrastate or interstate commerce.

A. J. Turman, the operator of the Tennessee Central Railway Company at Emory Gap Station and though the orders come from the train dispatchers as to when trains should be made up and leave Emory Gap, had some five to ten minutes before Pyle was killed called Pyle over the telephone and instructed him that No. 81 was called for five

o'clock. No. 81 being a freight train running between Emory Gap Station, Tennessee, and Nashville, Tennessee, and the crew for which would not go beyond Nashville, Tennessee, and would make an intrastate run. It was Pyle's duty to notify the crew of the time this freight train was called to leave. Pyle had started in the performance of his duty to notify the crew and he called E. E. Smith, the engineer, by telephone at his residence in Harriman, Tennessee, and had also gone to a caboose where the conductor and some of the brakemen slept during their rest period and had notified some of them; the conductor, however, not being at the caboose at the time, and Pyle was on his way across the track of the C. N. O. & T. P. Railroad right of way at the depot to call a fireman who boarded at a house on the opposite side of the railroad track of the C. N. O. & T. P. Railroad from where the caboose was located, and while on his way across Pyle was killed. The particular thing that Pyle was doing at the time he was killed was he was going to call Luster, the foreman for train No. 81.

Under the statements made by Turman, the operator, and E. E. Smith, the engineer for No. 81, Smith was called approximately five minutes before Pyle was killed and Smith says that it was forty-five minutes or approximately from the time he was called until he (Smith) reached Emory Gap Station ready to enter upon his duties as engineer on train No. 81. Pyle had not reached Luster to notify him that he was called to go out as foreman on the train, consequently nothing had been done by either the foreman or engineer to the engine that was to pull No. 81 on this trip. The proof being that it was the duty of the yard crew at Emory Gap to make up the train on the side track all except hooking the engine to it and that it was the duty of the engineer on the engine that was to pull the train to back his engine in and have it con-

nected to the train, hence his engine was not connected to train No. 81 under forty minutes from the time Pyle was killed because the proof is that the train didn't leave itself until 5:30 and Pyle was killed at about 4:15, so that the train didn't move for about an hour and a quarter after Pyle was killed. Under this proof no member of the train crew of No. 81 had performed a single duty toward the moving of said train. In so far as the record shows the conductor had no duty to perform with reference to train No. 81 until the train actually started to move out of the yards of Emory Gap and the fireman and engineer performed no duty except to take the engine from the side track where it was stored between runs and take it over and couple it onto the train and this was not done until after E. E. Smith, the engineer, reached Emory Gap, which, according to this record under the best estimate we can get was forty minutes after Pyle was killed. How long a time elapsed after Smith reached Emory Gap before he actually coupled the engine on the train the record does not disclose, there being a period of approximately 35 minutes between the time Smith reached Emory Gap and the time the train went out at 5:30.

Under this state of facts was Pyle engaged in interstate commerce? We think not.

In a note to *Lamphere* v. *Oregon R. & Nav. Co.*, 47 L. R. A. (N. S.) 53, it is said:

> "The act does not necessarily apply to the same person in all details of his employment, and one man may have duties including both interstate and intrastate commerce, and he would be subject to the act while engaged in the one, and not in the other. In determining the question whether the injured employee was engaged in interstate commerce, the general duties of the employee are to be considered. If the employee is engaged in interstate commerce, so is the railroad,

for the road is the master and the servant's act is its act."

The converse of this would be true, if the servant is engaged in intrastate commerce, the railroad would be engaged in intrastate commerce.

Considering the general duties of Pearson Pyle he was Yard Foreman at Emory Gap and as shown by the record in this case his duties were entirely at Emory Gap, never being called away from there, and had but very little, if any, connection with interstate commerce. It was his duty to see that the engines, and which engines so far as this record discloses, never went out of the State but made entirely intrastate runs, were cared for between the runs, coaled, watered and oiled. Pyle did not do this work himself but only had oversight of it. He had an office in the yards at Emory Gap where he kept records and made reports, received and checked out supplies that were to be used in the business of the Company there at Emory Gap; in fact when you look at his general duties it is not disclosed in the record that he did anything that was directly connected with interstate commerce. If, however, at times he did some acts that were directly connected with interstate commerce there was very few of them and the principal part of his duties, if not all of them, were intrastate commerce.

Conflict with Other Authorities.

(a) Conflict with holdings of the United States Supreme Court.

The decision of the Supreme Court of Tennessee is erroneous and untenable and in conflict with the decisions of this Court as made in other similar cases, to which we call the Court's attention:

"An employee of an interstate railroad company, who was engaged in the work of cutting a tunnel, is

not employed in interstate commerce, where the tunnel is only partially completed, since it was not in use then as an instrumentality of interstate commerce."

Raymond v. *C. M. & St. P. R. Co.*, 243 U. S. 43, 61 L. Ed. 583, 37 S. Ct. Rep. 268 affirming 147 C. C. A. 245, 233 Fed. 239;

Jackson v. *C. M. & St. P. R. Co.*, 210 Fed. 495;

Tilli v. *Philadelphia & R. R. Co.*, 263 Penn. 558, 107 Atl. 330.

"An employee engaged in the construction of a bridge 600 feet distant from the railroad, on a cut-off more than a mile in length, which had never been provided with rails or used as a railroad, is not employed in interstate commerce, although his employer is so engaged and intends to use the cut-off therein when completed. *Bravis* v. *Chicago M. & St. P. R. Co.*, 133 C. C. A. 228, 217 Fed. 234. The Court said: 'Those employed in the preparation of construction of roadbed, rails, ties, cars, engines, and other instrumentalities which are intended for use in interstate commerce but have never been and are not in use therein are not employed in interstate commerce and not protected by that (Federal Employers' Liability) Act.'"

"A machinist helper, engaged, while making repairs in the roundhouse upon an engine which had been used in hauling over the Railway Company's line freight trains carrying both interstate and intrastate freight, and which was used in the same way after the accident, is not then employed in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908."

Minn. & St. L. R. R. Co. v. *Winters*, 242 U. S. 353, 37 S. Ct. 170.

"Mining coal for use in locomotives which are employed in interstate commerce is not within the provisions of the Federal statute." *D. W. & L. R. Co.* v. *Yurkonis*, 238 U. S. 444, 59 L. Ed. 1400, 35 S. Ct. Rep. 902. "In accordance with the principles of that case, it may be stated, as a general rule, that no employee

is within the Federal statute who is engaged merely in procuring, preparing and transporting or storing supplies which are to be stored and held for future use, although the use to which they are put may ultimately prove to be intimately connected with the interstate transactions of the road or which is merely for the use, not of interstate commerce, but of other employees who may be so engaged."

Citing: *Salmon* v. *Sou. R. R.*, 133 Tenn. 223, 180 S. W. 165.

"An employee engaged in wheeling coal to be used as fuel in a shop in which other employees are engaged in repairing cars used in interstate commerce is not within the protection of the statute."

I. C. R. Co. v. *Cousins*, 241 U. S. 641, 60 L. Ed. 1216, 36 S. Ct. Rep. 446, reversing 126 Minn. 172, 148 N. V. 58.

"A yard conductor who was injured while going to the yardmaster's office for further orders, having executed all previous orders, is not employed in interstate commerce, although the orders which he would have received, had he not been injured, would have required him immediately to make up an interstate train."

Erie R. R. Co. v. *Welch*, 242 U. S. 303, 61 L. Ed. 319, 37 S. Ct. Rep. 116.

"In *Fentermacher* v. *C. R. I. & P. R. Co.*, 309 Mo. 475, 274 S. W. 718, Certiorari denied in 1925, 269 U. S. 576, 70 L. Ed. 420, 45 S. Ct. Rep. 102, it was held that an employee of the defendant Railroad was not engaged in interstate commerce within the Federal Act, while he was engaged in loading telegraph poles on a car, which poles were to be taken to another town within the State and used by other employees in the repair of a telegraph line operated by the defendant in connection with its intra and interstate business. The Court said: 'We are not in doubt that the telegraph lines, by use in furthering and protecting interstate commerce, became definitely impressed with the character of an interstate facility, and that one engaged in operating or repair-

ing such facility was at least engaged in work so closely related to interstate commerce as to be a part of it;' but pointed out that the work being done was too remote from the actual work of repairing an interstate facility being separated therefrom by at least three distinct operations—hauling to the second town, being unloaded there, making the actual repair."

"A fireman employed by an interstate railway carrier on a switching engine, who was killed while aiding in the work of moving several cars all loaded with intrastate freight, between two points in the same city (New Orleans), was not employed in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908, making every common carrier by railroad, while engaged in interstate commerce liable to an employee, 'suffering injury while he is employed by such carrier in such commerce', although upon completion of that task the switching crew was to have gathered up and taken to other points several cars as a step or link in both interstate and intrastate transportation."

Illinois C. R. Co. v. *Behrens,* 235 U. S. 473, 34 S. Ct. 646, Ann. Cas. 1914 C. 163.

"A night watchman in the employ of a railroad company, injured while in the performance of his duty to guard tools and materials intended to be used in the construction of a new railway station and new tracks, is not then engaged in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908—, although such station and tracks were designed for use when finished, in interstate commerce."

N. Y. C. R. Co. v. *White,* 243 U. S. 188, 37 S. Ct. 247; Ann. Cas. 1917 D. 629.

"In this same opinion it was held that the Workmen's Compensation Statute of the State of New York was not unconstitutional, and that the Federal Statute did not preclude the recovery by the injured employee under said compensation law.

"Where an employee of a railroad company engaged in interstate commerce was injured while engaged in intrastate commerce, it was held that the State Workmen's Compensation Act applied, and the employer not having elected to come under the Act, the employee had a right of action at common law, aided by the provisions of the Compensation Act, which, under the circumstances, deprived the employer of the defenses of contributory negligence, negligence of a fellow servant, and assumpton of risk."

Foley v. *Hines* (1920), 119 No. 425, 111 Atl. 715; (writ of certiorari denied in (1921) 256 U. S. 690, 65 L. Ed. 1173, 41 S. Ct. 250).

(b) The decision of the Supreme Court of Tennessee is erroneous and untenable and in conflict with the decisions of other Federal Courts as made in similar cases, to which we call the Court's attention as follows:

"An employee engaged in cleaning stencils used by the railroad company to mark cars owned and used by it in interstate commerce is not himself engaged in interstate commerce."

I. C. R. Co. v. *Rogers*, 136 C. C. A. 530, 221 Fed. 52

"A trackman engaged in storing new rails in a pit between the tracks, against the time when they may be required for track repairing or any other purpose, is not engaged in interstate commerce, although practically the entire business of the carrier is interstate." *Hudson & M. R. Co.* v. *Lorio*, 152 C. C. A. 641, 239 Fed. 85. "The Court said: 'It cannot be said the rails which Lorio (the injured employee) was engaged in storing against the use that was certainly not imminent, and might never occur, were at the moment engaged in or practically a part of interstate commerce; for that commerce was going on without any present assistance either from Lorio or the rails on which he was working, or the men who were working with him.' "

"A yard employee whose duty it is to close an icehouse is not engaged in interstate commerce when en-

gaged in the operation of receiving ice from a delivery wagon, which is to be placed in an ice box for future use as required."

Sou. R. Co. v. *Pitchford,* 165 C. C. A. 230, 253 Fed. 736.

"A brakeman having been engaged in delivering cars from Pennsylvania destined to points in New York, which was concededly interstate commerce journey, was killed while at work on one of the cars which were again being moved from New York, and were picked up at a point in Pennsylvania, to be moved to other points in Pennsylvania to be assembled and distributed, the cars were not billed or marked for any particular destination and were moving about more or less aimlessly. The Court held that the brakeman was not employed in interstate commerce and did not come within the scope of the Act."

Penn. R. v. *Knox,* 218 Fed. 748, 134 C. C. A. 426.

"A member of a switching crew in a freight yard of a railroad company who handled both interstate and intrastate cars and who was injured while shunting 'empty cars upon a siding of a local manufacturing company' was held not to be engaged in interstate commerce at the time of the accident."

Shanley v. *Philadelphia, etc., R. Co.,* 221 Fed. 1012.

(c) The decision of the Supreme Court of Tennessee is erroneous and untenable and in conflict with the decisions of the Courts of Last Resort of other States in similar cases to which we call the attention of the Court as follows:

"A further test as to whether an injured employee was engaged in interstate commerce at the time he received his injury, so as to make applicable the Employers' Liability Act, is the nature of the work he was doing at the time of the injury, and the mere expectation that he would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the Act."

"The purpose to devote, in future, an agency capable of use in interstate commerce to that service, will not meet the condition of the statute, though physical preparation of the agency for immediate use in such commerce may suffice to invoke this provision of the statute."

"When the employer is engaged in interstate commerce by railroad, the specific labor in which the employee is engaged at a given time takes its character as a part of State or interstate commerce, not from the nature of his general employment nor from the nature of the specific work, but from the relation of that work to interstate commerce."

Bolch v. *C. M. & St. P. Railroad,* 90 Wash. 47, 155 Pac. 422.

"The Court says: 'The Federal Act was intended to be restricted to the instance where the work being done at the time of the injury was concerned directly and not indirectly with interstate commerce.' The true test is not whether the work was an essential part of the activities of an interstate carrier the performance of which might or would delay or hinder the proper transaction of its interstate business, but was it part of the interstate commerce transacted by the carrier. The Court further said that the accident in the case before it undoubtedly delayed the performance of interstate work, yet it could not be said for that reason that the employee should be held to have been engaged in interstate commerce at the time of the injury.

Harrington v. *C. B. & Q. R. Co.,* 180 S. W. 443.

A workman employed as a carpenter in building forms on the margins of the right of way, in which concrete was to be poured for the purpose of forming retaining walls, the forms to be removed after the concrete is set, and the space between the walls filled with material upon which elevated tracks would rest, is not engaged in interstate so as to be without the protection of the State Compensation Act.

Dickinson v. *Industrial Board* (1917). 280 Ill. 342, 117 N. E. 438. The Court said that the forms were not

instrumentalities of interstate commerce, and the retaining wall, which had not yet been built, could not be such instrumentalities until the filling which they were to retain, and upon which the tracks were to rest had been deposited in place.

An engineer operating a steam crane which was hoisting and pouring concrete into forms for a retaining wall, to be used in elevating railroad track, is not engaged in interstate commerce.
Klomp v. *C. M. & St. P. R. Co.*, 210 Ill. App. 375.

An employee of an interstate character, working in an excavation under a wooden trestle on which the employer's tracks crosses a small stream, and near the supporting timbers thereof, intended for an abutment of a steel bridge to take the place of the trestle and to build in lieu thereof when completed, and not repairing or altering the trestle, not otherwise engaged upon it or the track, or anything else actually used in the operation of the road, is not within the protection of the statute. *McKee* v. *Ohio Valley Electric Co.*, 78 W. Va., 131, 88 S. E. 616. The Court said: "Perdue was not doing any work on any structure or other instrumentality in actual railway use at the time of his injury. Hence, unless work he was doing was so intimately connected with something else actually used at the time as to make it a part thereof, he was not, in the legal sense of the term, engaged in interstate commerce. At the time the cars in use were operated, at the place at which he was at work, over a wooden trestle spanning the creek. He worked in a excavation made under the trestle or near the supported timbers thereof, for the west abutment of a pier of a new steel bridge then to be erected, or in process of erection, and which when completed was to take the place of the trestle and be used in lieu thereof. It does not appear that any part of the new bridge had yet been placed on its piers * * * only in respect of its intended use and the statute or character of the Company by which it was performed did the work bear any relation to interstate commerce."

In *Granger* v. *Penn. R. Co.* 84 J. N. L. 338, 86 Atl. 264 it held that the work of oiling a switch which is sometimes used in interstate and sometimes in intrastate transportation is not engaged in interstate commerce.

Again quoting from *Charleston & W. C. R. Co.* v. *Anchors,* 10 Ga. App. 322, 73 S. E. 551, where a section foreman at work on a track over which interstate commerce passed was injured by reason of being struck by a particle of iron put in flight by the negligent blow of a hammer in the hands of one of the men under him, the Court said: "To our minds, neither the servant who struck the blow, nor the servant whose eye was injured through the blow being struck, was engaged in interstate commerce, since the whole object of striking the blow was merely to drive a spike to hold in place a rail that this defendant might have a railroad track upon which it could thereafter, if it so desired, engage in commerce, either interstate or intrastate. If the distinction between preparing to engage in commerce and the act of actually engaging in it is to be observed, this transaction falls squarely within the domain of preparation."

In *Grovio* v. *N. Y. Cent. R. Co.* 176 App. Div. 230, 162 N. Y. S. 1026 wherein it appeared that an employee was engaged in shoveling coal into engine at a coal chute or shoveling the coal from cars into the chute and that immediately before his injury he had been engaged in coaling a switch engine which was used for handling both interstate and intrastate business, it was held that he was not engaged in interstate commerce.

A car repairer cannot be said to be engaged in interstate commerce while working on a car which has been used in such commerce but which while being repaired is empty, and is not used in any kind of transportation, and it does not appear that the car is used exclusively in such commerce.

Defenbaugh v. *Union P. R. Co.* 102 Kan. 569, 171 Pac. 647.

"A railroad employee injured while assisting in repairing a locomotive which has been used or to be used wholly within the State of Alabama in drawing a work train engaged in repairing the railroad company's interstate track is not within the Federal Employers Liability Act and was entitled to sue under the State Statute, since the Federal Act is only applicable to those in the employment of interstate carriers who at the time of the injury are engaged in work immediately related and directly contributory to interstate commerce, and, while such relation exists when his services is in or about the maintenance or repair of agencies already devoted to or immediately capable of facilitating some essential feature of interstate commerce, the engine in question was not an instrumentality of such commerce nor an immediately or directly applied means to the maintenance or repair of any indispensable feature of interstate transportation, but was only brought into a secondary relation to an interstate instrumentality." *L. & N. R. R. Co.* v. *Carter,* 195 Ala. 382, 70 So. 65.

An employee engaged in repairing a boiler, a part of the wrecking appliance of the railroad company was held not to be engaged in interstate commerce, when at the time, the boiler was lying near the wrecking car in a roundhouse. *Ruck* v. *Chicago M. & St. P. R. Co.* 150 Wis. 158, 140 N. W. 1074. The Court said: "We reach the conclusion that the employee is not employed by the carrier in interstate commerce where he is engaged in constructing or repairing an appliance which appliance may thereafter be used to facilitate intrastate or interstate transportation as the occasion may require and is intended for such use, but is not, at the time the repairs in question being made in use for the purpose of facilitating interstate trasportation."

An employee engaged in mining gravel and loading it upon cars, to be used in the repair of the road bed over which interstate commerce of the railroad was being operated, is not engaged in interstate commerce. *Yazoc & Miss. Valley R. R. Co.* v. *Houston,* 114 Miss. 888; 75 So. 690.

Another case to the effect as the last above is *Malandrine* v. *Sou. N. Y. Power & R. Corp.* 190 App. Div. 780; 180 N. Y. Supp. 735.

An employee of an interstate railroad, engaged in peeling bark from ties intended for future use in the road bed, is not engaged in interstate commerce so as to come within the Federal Employers Liability Act, although the work is done on the right of way. The Court says the peeling was a part of manufacturing the ties for the purposes intended. *Karras* v. *Chicago & N. W. R. Co.* 165 Wis. 578, L. R. A. 1917 E. 677, 162 N. W. 923.

One employed to gather ties along a branch of an interstate railroad, and transport them to a siding from which they were picked up and taken to the treating plant, from which they were distributed along the road as needed, is not engaged in interstate commerce so as to come within the protection of the Federal Employers Liability Act.

Alexander v. *Great Northern R. Co.*, 51 Mont., 565; L. R. A. 1918 E. 862; 154 Pac. 914.

The work of selecting rough lumber in a lumber yard, which, after being prepared in a plaining mill, was to be sent outside of the State for use at a shop of the railroad company in its repair work, is not interstate commerce.

Sullivan v. *Chicago M. & St. P. R. Co.* 163 Wis. 583, 158 N. W. 321.

An employee engaged in stacking ties which had been unloaded on the right of way was not engaged in furthering interstate commerce, although the ties was subsequently to be used as needed in repairing interstate tracks. *M. K. & T. R. Co.* v. *Watson,* Tex. Civ. App. 195 S. W. 1177, upholding a judgment for the plaintiff based upon the state law which abolished the defense of the assumption of risk.

Bridge material for the defendant railroad Company, which had been shipped in from another State, but which, at the time of the injury had been switched

from one to another of the tracks in the yard for the purpose of being unloaded and stored, is not, at the time of the unloading, the subject of interstate commerce, since the interstate movements had stopped at the time when it was moved from one track to another within the yard. *Sou. R. Co.* v. *Maxwell,* 117 Miss. 62, 77 So. 905.

One employed in a round house to pack the engine boxes is not engaged in interstate commerce, when he attempts to use a circular saw in the round house to make himself a tool box to aid in the performance of his work.

Froelich v. *Northern P. R. Co.* North Dakota 173, N. W. 822.

A brakeman on a train used to carry water to a tank for the use of engines on the road, is not engaged in interstate commerce merely because some of the engines taking water from the tank are engaged in interstate commerce. *M. K. & T. R. Co.* v. *Fesmire,* Tex. Civ. App. 150 S. W. 201.

The moving and stacking for future use of concrete blocks to be used in replacing wooden culverts on an interstate road is not interstate commerce. *Morrison* v. *Chicago M. & St. P. R. R. Co.* 103 Wash. 650, 175 Pac. 327.

An employee engaged in coaling a switch engine, used solely within the yards in moving cars from one place to another, is not engaged in interstate commerce while coaling the engine at a time when it had finished its work for the day and during the day in question had moved nothing but interstate cars.

Giovio v. *N. Y. C. R. Co.* 175 App. Div. 230, 162 N. Y. Supp. 1026, affirmed in 1918, 223 N. Y. 653, 119 N. E. 1044.

An inspector of engines in a round house is not, while so employed, engaged in interstate commerce, although the engine coming in or employed indiscriminately in interstate and intrastate commerce. *Mitchell* v. *Sou. R. Co.* 23 Ga. App. 195, 98 S. E. 184.

A conductor of a train running between points in the same State is not after reaching his destination and uncoupling motor and caboose from the train and proceeding to take them to the barn and storage track, engaged in interstate commerce, altho' his train contained an interstate car before he uncoupled it, which car had been delivered to the transfer track for delivery to the connecting carrier. The Court said the service in interstate commerce was completed sometime before the accident. The movement of the train from the transfer track, the placing of the cars on one of defendant sidings, the caboose on the other, and the motor in the barn, did not partake of the character of interstate commerce. *Smith* v. *Interurban R. Co.* Iowa 171 N. W. 134.

The Wisconsin Court has held that taking care of an engine after its run and preparing its run and preparing it for the round house is not interstate commerce, although on its run it may have drawn an interstate train.

Gray v. *Chicago & M. W. R. Co.* 153 Wis. 637, 142, N. W. 505.

A case almost exactly the case of *Tennessee R. R.* v. *Chitwood* reported in 163 Tenn. and cited on page 12 herein is the case of *M. K. & T. R. Co.* v. *Pace,* Tex. Civ. App. 184 S. W. 1051.

The decision *Behrens* case, (1915) 233 U. S. 473, 58 L. Ed. 1051, 34 Sup. Ct. Rep. 646, Anno. Cas. 1914 C. 163, 10 C. C. A. 153, was followed and recovery under the statute denied by the Oklahoma Court in a case where a brakeman was injured while making a coupling between the tender and a baggage car where it did not appear that the engine tender or baggage car contained any person or thing in route from or to any place beyond the State, or that either of these had come from beyond the State, notwithstanding the defenants intended immediately thereupon to incorporate in the train a number of freight cars, including three then in service of interstate freight.

Atchison T. & S. P. R. Co. v. *Pitts.,* 44 Okla. 604, 145 Pac. 1148.

"The coal in question at the time of the plaintiff's injury had not become an instrumentality of interstate commerce and therefore the plaintiff was not employed in that commerce. He was at work assisting in the removal of coal in bulk from the bole to cars of the consignee or to the general pile on the wharf. No part of it had been appropriated or segregated to interstate use. It might be used for that purpose, or it might be used for interstate locomotives or for both. At sometime in the future some other employee, if engaged in coaling an interstate engine from some portion of the stock would be within the act * * * but that time had not arrived and the plaintiff's was no more directly and immediately connected with and is substantially incident of interstate commerce than that of a workman loading a railroad car at the mines."

Foley v. *Hines,* Maine 111 Atl. 715.

"An employee in an engine house is not engaged in interstate commerce when crossing the track to send a telegram of the road, although it may result in the shipment of coal for use of engine engaged in interstate commerce."

Hines v. *Baecgtel,* Md. 113 Atl. 126.

"It is conceded that plaintiff occupied the caboose as headquarters and as a resting place while at Mil between runs. He could as well have been at a Hotel * * * his train was not made up * * * he did the most natural thing for his own comfort, under the circumstances—lighted the lamp, started the fire, changed his clothes, and was in the act of lighting his lantern when the jolt came. These acts, under such circumstances, cannot be held to be the duties of a head brakeman. It required from one to two hours for the switching crew to make up the train, the jolt came from the first act of coupling cars onto the caboose in making up the train. It follows that plaintiff was not engaged in interstate commerce at the time in question. Minn. 195 N. W. 534."

"A section hand engaged in unloading an interstate car of cross ties which are to be used as needed on a stretch of defendant's main line over which intrastate and interstate commerce is hauled, while the car was standing on the side track is not engaged in interstate commerce. Arizona Eastern R. R. Co. *v.* Head (1924), 26 Ariz. 127, 222 Pac. 1041, motion to modify judgment denied in 1924, 26 Ariz. 259, 224 Pac. 1057. The Court pointed out in this case that the ties to be replaced had not been located or marked and that therefore the time and place of their use were unknown, and distinguished it from a case wherein it was held that one carrying rivets from a tool car to a bridge where they were to be used in repairing the bridge was engaged in interstate commerce by saying: 'The work performed was the last manuel labor before it was appropriated to its intended use (Kihler *v.* Davis, 1923, 109 Neb. 837, 192 N. W. 732), whereas in the present case what the plaintiff was not the last manuel labor performed before the ties were appropriated to their intended use."

"A bridge foreman engaged in unloading an intrastate shipment of piles which were to be used in securing the abutments of a nearby railroad bridge which was used by the defendant's trains hauling both intrastate and interstate shipments was held not engaged in interstate commerce within the Federal Act, on the ground that the facilities must have become a part of the structure or maintenance before they become instruments of interstate commerce, and that, in repairing a facility, work thereon must have actually begun."

Dupois v. *La. R. & Nav. Co.* (1924), 155 La. 923, 99 Sou. 709.

"A conductor on a local electric car engaged wholly in intrastate service, who is injured while watching for an interstate train, so that it may pass his car is not engaged in interstate commerce, it was held and cannot bring an action under the Federal Act."

Miller v. *K. C. & W. R. Co.*, 160 Mo. 371; 128 S. W. 336.

"A conductor on a street car which ran between two points in the same State, which transferred or connected with a line running out of the State and which at the time of the accident carried one passenger going to a railroad station, to which the trolley was destined, to board a train for Nebraska, and who was killed in the accident, was not at the time within the Federal Act."

Kiser v. *Metropolitan St. R. Co.*, 188 Mo. 10; 175 S. W. 98.

To substantially the same effect, see *Watts* v. *Ohio Valley Electric Co.* (W. Va.), 88 S. E. 659.

"It was held that a member of a switching crew killed while engaged at work as a fireman on a switching engine, drawing intrastate cars at the time of the injury, did not come under the Federal Act."

Louisville, etc., R. Co. v. *Parker*, 165 Ky. 658; 177 S. W. 465.

"The Federal Employers' Liability Act does not supersede the common law and statutory law of the several States to such an extent that every employee of an interstate carrier must recover for personal injuries under that Act or not at all, but permits of a recovery under State laws if the employee is not within the terms of the Federal Act. This holding is in accord with the interpretation given to the Act by the Federal Courts."

Grow v. *Oregon Short Line R. Co.*, 44 Utah 160; 133 Pac. 398, Ann. Cas. 1915 B 481.

Another case to the same effect is in *Armburg* v. *Boston & M. R. Co.*, 276 Mass. 418; 177 N. E. 665; 80 A. L. R. 1408.

"The test to be applied in determining whether a case falls within purview of the Federal Employers'

Liability Act rather than within the Missouri Workmen's Compensation law is whether employee at time of injury was engaged in interstate transportation or in work so closely related to it as to be practically a part thereof, but in applying the test, each case must stand on its own bottom."

Mo. St. Ann. 3299-3376, pp. 8229-8294; Federal Employers' Liability Act, 45 U. S. C. A. 51-99; *State ex rel Mulcahy* v. *Hostetter,* 139 S. W. (2d) 939, dismissing certiorari *Mulcahy* v. *Terminal R. Ass'n. of St. Louis,* 123 S. W. (2d) 235.

After much search we have found one case directly in point, where the injured employee at the time of his injury was calling a train crew to take out an interstate train and which it was held that the thing which he was doing was *not interstate commerce* within the meaning of the Federal Employers' Liability Act.

This is an Illinois case; a State the opinion of whose courts are held in as high esteem as those of any State in the Union save perhaps New York State.

It is the case of *Mitchell* v. *Louisville, etc., R. Co.,* 194 Ill. App. 77, wherein it is said:

"The Courts have been liberal in the application of the law as to when employees are engaged in interstate commerce within the meaning of the Act in question. The employee must be engaged in work on some of the instrumentalities of interstate commerce. If this is his employment, it makes no difference how important or how unimportant it may be or whether he is at the time driving the nail or handling that particular car. * * * However, on the other hand, in so far as we have examined the authorities, the employee must at the time have something to do in furthering interstate commerce either in the repair of the road, cars, engines or trains, or moving trains engaged in interstate commerce. It has never been held that because someone gave orders or directions to those so engaged that he

was himself engaged in interstate commerce because of such orders. The connection with interstate commerce must be direct and not indirect and remote.

Appellee had no direct connection with interstate commerce. His duties were local and in no way connected with interstate commerce. Call the men that were to perform those duties. If this is a part of interstate commerce every employee of a railroad company, no matter who he is, who directs men so engaged comes within the law. This construction carried into all of these positions would defeat the intention and purpose of the statute. Appellee was not engaged at the time of the injury in interstate commerce and under his declaration could not recover."

"It was further held in that case that the mere fact that an injured employee was expected on the completion of that task to engage in another which would have been a part of interstate commerce did not alter the rule."

(d) The decision of the Supreme Court of Tennessee in this case is in conflict with other decisions made by said Supreme Court of Tennessee construing the Federal Employers Liability Act

"There must be an immediate connection between interstate commerce and the act or duty in course of performance at the time the injury occurs."

Salmon Southern Railroad Co., 133 Tenn. 223, 180 S. W. 165.

An employee of an interstate railroad who was injured while engaged in unloading paint at the repair shop of the Company where the paint was stored until it was desired for use in painting indiscriminately interstate and intrastate cars, was not himself engaged at the time of his injury in interstate commerce.

Salmon v. *Sou. R. R. Co.*, 133 Tenn. 223, 180 S. W. 165.

"The language of section 6 (a) of the Workmen's Compensation Act (Acts of 1919, Ch. 123) providing

that this Act shall not apply to any common carrier, while engaged in interstate commerce, does not exclude from the application of the statute every common carrier doing an interstate business, but such carriers are excluded only 'while engaged in interstate commerce' ".

"2. To take the case out of the application of the Workmen's Compensation Act, the work that the employer and employee are jointly engaged in at the time of injury must be an act of interstate commerce, or so closely related, as to be a practical part of it."

"3. Where the declaration shows affirmatively that plaintiff at time of injury was not engaged in interstate transportation nor in work so closely related to it as to be practically a part of it, a demurrer was properly sustained on the ground that the accident, and remedy of the plaintiff falls within the Workmen's Compensation Act and not within the Federal Statute."

Williams v. *Railroad Co.* 154 Tenn. 224.

We quote from the body of the opinion, on page 228, as follows:

"To exclude the injury from the application of the statute, it is not sufficient that the employer be doing an interstate business as a common carrier, the statute expressly providing that the employer must also be 'engaged in interstate commerce.' This can only mean that the work in which the employer and employee are jointly engaged, as master and servant, at the time of the injury be an act of interstate commerce, or so closely related to interstate commerce as to be practically a part of it."

Summary.

Examination of the authorities above cited, and of the authorities in general discloses that one distinction between a man who is engaged in interstate commerce and one who is not is determined as to whether he is working with or on an instrumentality that is engaged in interstate commerce. If the employee is actually engaged in manual labor

on an instrumentality that at the time is engaged in interstate commerce then the employee is engagd in interstate commerce. An example, an engineer on an engine pulling a train containing interstate cars.

In the instant case the deceased, Pyle, didn't work on anything. He was yard foreman and his duties consisted of doing a certain amount of clerical work and of telling the other employees when and where to work and what to do, and to see that they did it. The distinction being the man who does the work on or with the instrumentality engaged in interstate commerce is an interstate employee, but the man who simply directs and does no work on or with the instrumentality is one step to far removed and is not engaged in interstate commerce or so closely related to it as to be practically a part of it.

At the time the deceased, Pyle, was killed no member of the crew of train No. 81 was on duty. The conductor, Harsh, says it was twenty minutes after he learned of Pyles death before he went on duty. The engineer E. E. Smith, was still at his home in Harriman two miles away and the fireman hadn't yet even been notified. It was while going across the track to notify the fireman that Pyle was killed.

If any member of the train crew of No. 81 had been killed at the time when Pyle was he could not and undoubtedly would not, not being on duty, have been held to have been engaged in interstate commerce. How then can it be said that Pyle who was simply notifying them of the time when they were to go to work, was engaged in interstate commerce? If Pyle was not engaged in interstate commerce then under the holding in *Williams* v. *Railroad Company, Supra,* the railroad company was not engaged in interstate commerce at the time of the fatal injury to Pyle.

Respectfully submitted,

J. W. Stone,
Attorney for Petitioner.

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CHARLES ELMORE CROPLEY
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In the

Supreme Court of the United States

October Term, 1940.

No. [redacted] 73

MRS. NANNIE ETLE,
Petitioner.

vs.

TENNESSEE CENTRAL RAILWAY COMPANY,
Defendant.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, AND BRIEF IN SUPPORT THEREOF.

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In the

Supreme Court of the United States

October Term, 1940.

No. 1027.

MRS. NANNIE PYLE,
Petitioner.

vs.

TENNESSEE CENTRAL RAILWAY COMPANY,
Defendant.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Supreme Court of the United States:

A. STATEMENT OF THE CASE.

(1) This suit originated in the Circuit Court of Roane County, Tennessee, when the petitioner, Mrs. Nannie Pyle, brought her suit under the Workmen's Compensation Statute of the State of Tennessee, seeking to obtain compensation for the death of her husband, Pearson Pyle.

(2) The deceased, Pearson Pyle, was, on the 26th day of February, 1938, the date of his death, an employee of the respondent, Tennessee Central Railway Company, and had been an employee of the railway company at its yards in Emory Gap, Roane County, Tennessee, for a period of approximately nineteen years. Rec., p. 16.

(3) At the time of his death, he was the yard foreman and was engaged in the discharge of one of his duties.

(4) While engaged in line of duty in calling a crew for Tennessee Central Railway Company's freight train No. 81, the deceased was struck by a fast passenger train of the C., N., O. & T. P. Railroad and killed. Rec., pp. 12, 18, 19 and 20. Train No. 81, for which the deceased, Pearson Pyle, was calling a crew, was a freight train operated by respondent railway company and was made up at Emory Gap, Tennessee, its destination being Nashville, Tennessee.

(5) The duties of the deceased, Pearson Pyle, were "well, he looked after the engines and kept the yards clean, called out the train crews, notified the crews when their train was called to go out, and was clerk in the office, making out reports and time slips." Rec., p. 12.

The Tennessee Central Railway Company's freight train No. 81, as it was made up and went out of Emory Gap on the date that petitioner's husband was killed, consisted of thirteen cars, seven of which were loaded with intrastate shipments, or were empty and billed to intrastate points, *and six of which were loaded with interstate shipments.* Rec., p. 23.

(6) The Tennessee Central Railway Company and the C., N., O. and T. P. Railroad Company use the same depot at Emory Gap, Tennessee. The general direction of the tracks of both railroads, at this point, is north and south, with the depot east of all the tracks. Proceeding west from the depot, one would cross, in order: The C., N., O. & T. P. northbound main, then the C., N., O. & T. P. southbound main, then the interchange track, then some sidetracks of the Tennessee Central Railway Company, and then the

Tennessee Central Railway Company's main line. The deceased, Pearson Pyle, was killed by a fast passenger train on the northbound main line of the C., N., O. & T. P. Railroad when crossing the tracks to call a member of the crew for Tennessee Central Railway Company's train No. 81. Rec., pp. 17, 18, 19, and 27.

(7) The deceased left surviving him, his wife, Nannie Pyle, and one minor son, Lucian Pyle.

(8) The deceased's salary at the time of his death was approximately One Hundred Fifty and No/100 ($150.00) Dollars per month.

B. BASIS OF SUIT.

On the 27th day of January, 1939, the petitioner, Nannie Pyle, widow of the deceased, Pearson Pyle, for the benefit of herself and her minor son, Lucian Pyle, brought this suit under the provisions of the Workmen's Compensation Law of Tennessee. (Code of Tennessee, 1932, Title 14, Chapter 43, Sections 6851 to 6901, inclusive, and amendments thereto.)

Section 6856 of the Code of Tennessee, reads in part as follows:

> "This law shall not apply to whom,—'This chapter shall not apply to: (a) Any common carrier doing an interstate business, while engaged in interstate commerce. . . .'"

On May 9, 1939, the Tennessee Central Railway Company filed its answer. Rec., pp. 4 and 5.

The suit was heard before the Honorable Pat Quinn, Judge, etc., of the Circuit Court of Roane County, Ten-

nessee, on September 29, 1939, without the intervention of a jury. Rec., p. 11.

The suit was taken under advisement by the Court and on December 9, 1939, the Court caused to be entered a decree in favor of the petitioner, Mrs. Nannie Pyle. Rec., p. 6.

The Tennessee Central Railway Company filed a motion for a new trial on December 9, 1939, which likewise was taken under advisement by the Court and on January 22, 1940, said motion was by the Court overruled, and the railway company prayed and perfected its appeal to the Supreme Court of the State of Tennessee. Rec., pp. 8-11, inclusive, and p. 28.

The suit was heard by the Supreme Court of Tennessee, Eastern Division, and on November 23, 1940, the Court handed down its opinion reversing and dismissing the suit and a decree was entered thereon on said date. Rec., pp. 29 and 33.

OPINION OF THE SUPREME COURT OF TENNESSEE.

Filed November 23, 1940.

S. E. Cleage, *Clerk.*

Tennessee Central Railway Company
v.
Mrs. Nannie Pyle
} Roane Law

OPINION.

The petitioner in this compensation case is the widow of Pearson Pyle, who was killed by a train of the C., N., O. & T. P. Railway as it ran through the yards of Tennessee Central Railway at Emory Gap used jointly by these two

Railroads, about 4 P.M., February 26, 1938. Deceased was employed as yard foreman by the Tennessee Central Railway Company and was in the line of duty when killed. The defense of Tennessee Central Railway is that it is a "common carrier doing an interstate business" and that it was so engaged at the time when deceased was killed; that deceased was performing duties so closely related to interstate commerce as to be a practical part of such commerce; and the exemption expressly provided by Code Section 6856, subsection (a) of the compensation law, is invoked and relied on. That Section reads: "*This law shall not apply to whom.*—This chapter shall not apply to:

(a) Any common carrier doing an interstate business while engaged in interstate commerce."

The trial Court granted petitioner an award based on a monthly salary of $150.00. The amount is not controverted, if Tennessee Central Railway is liable under the Compensation Act.

There is practically no dispute about the controlling facts. The Tennessee Central operates over a line extending from its Emory Gap, Tennessee, yard, of which deceased was foreman, through Nashville to Hopkinsville in the State of Kentucky. It is, therefore, an interstate common carrier. This was a junction or connecting point with other lines at which cars were transferred therefrom to the Tennessee Central to be by it continued in transportation to destination.

Describing her husband's duties as foreman of this Emory Gap yard, petitioner said, "Well, he looked after the engines and kept the yard clear, called out the train crews, notified the crews *when their train was called to go out,*"

etc. She said he was not supposed to do the work himself, but "he was overseer to see it was done." She said he informed the men when the engines were ready to go out—that it was a part of his duty to "notify the crews when they were to go out."

On this afternoon, freight train No. 81 was scheduled to start for Nashville, its destination, at about 5 P.M. Some of the crews of this train occupied a caboose which was standing on a side track in this yard. In discharge of his duty, as above shown, foreman Pyle started to this caboose. In crossing the intervening main line track of the C., N., O. & T. P. Railway, he was struck and killed by a fast through train of that line. His body was thrown some 150 feet beyond the station platform.

While the destination of this train, No. 81, was Nashville, an interstate point, it appears that at least six of the freight cars composing it, about one-half of the whole number making up this train, were *interstate shipments,* en route from originating points in other States. One car of pulp and one of coal originated at Appalachian, Virginia; one of salt at Fort Huron, Michigan; one of merchandise at Spencer, North Carolina, and one at Saltville, Virginia. Now it was the crew of this train, whose duty it was to "make up the train" and to man it, that the deceased was in the act of notifying to begin this work when he was killed. It was while performing this part of the duties devolving upon him, the *particular duty of summoning* and giving orders to the crew of this train, made up of these car loads of freight in the process of transportation from points in various other States to Nashville, that this employee met his untimely death. Is it possible to deny that his employer was at the time "a common carrier doing an

interstate business," and "engaged in interstate commerce"? We think not. And, if the employer was so engaged at the time, in the very particular as to which this employee was serving, then *both alike* were engaged in interstate commerce. Certainly, *the Railway Company was engaged in interstate commerce.* It was an essential incident of transportation of these cars that they should be placed in this train after they had arrived from other States en route to Nashville. And this yard foreman was also so engaged when, acting for his Company, he was notifying and directing the train crew touching their duties. If the crew of men he was notifying or signaling to act were engaged in interstate commerce,—of which there can be no doubt,—then the *foreman* or boss *was* also so engaged.

In *Vaught* v. *East Tennessee & W., N. C. Ry. Co.,* 148 Tenn., 379, this Court approved as "the true test" this statement of the rule from the leading case of *Shanks* v. *Delaware, L. & W. R. Co.,* 239 U. S., page 556: "Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?"

In *Prince* v. *Nashville, Chattanooga & St. Louis Railway,* 152 Tenn., 189, the principle was applied that maintenance of a railroad right of way, used by both interstate and intrastate trains, is so much a part of interstate commerce as to exclude application of our Compensation Act. In that case the injured employee was working on the banks of the right of way. The holding would have been the same if he had been working on the tracks in this yard. And the holding would have been the same if the employee had been a section foreman, instead of a section hand. And so we think this foreman, whose duty was to "oversee" the yard—see

that it was in good and safe condition—was engaged in a branch of interstate commerce.

With special application to the duty this deceased was at the moment of his death performing, the opinion in *Erie Railroad Co.* v. *Collins,* 253 U. S., 77, 64 L. Ed., 790, is suggestive. Holding that the employee, whose usual duty was operating a signal tower in the yards, was still engaged in interstate commerce when injured while starting up a gasoline pump for water in the railroad yards, the Court said: "It can hardly be contended that while plaintiff was engaged in the signal tower he was not engaged in interstate commerce, though he may have on occasion signaled the approach or departure of intrastate trains." Now we have here an employee whose duty was to "signal" the crew to man the trains; is not his connection with interstate transportation as close as if his duty were to signal the crew to move the trains? And, as indicated in the foregoing quotation, that sometimes the trains are interstate and sometimes intrastate is immaterial.

The opinion in *Vaught* v. *Railway Co., supra,* cites and quotes from *Erie R. Co.* v. *Winfield,* 244 U. S., 170, 61 L. Ed., 1057, in which the injured employee had charge of the switching in the yard (a duty somewhat like that of deceased in this case), and was killed as he crossed some tracks as he was leaving the yard after work. We quote this language, which has application here:

> "In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. . . . Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole. . . . His day's work was in both interstate and intrastate commerce, and so when he was

leaving the yard at the time of the injury his employment was in both. That he was employed in interstate is therefore plain, and that his employment also extended to intrastate commerce is for present purposes of no importance."

In *Williams* v. *Railroad Co.*, 154 Tenn., 224, it was said: "The meaning of the language quoted from section 6 is clearly that the liability and rights defined in the statute shall not arise from an injury to an employee when his employer, doing an interstate business, is engaged in interstate commerce. To exclude the injury from the application of the statute, it is not sufficient that the employer be doing an interstate business as a common carrier, the statute expressly providing that the employer must also be 'engaged in interstate commerce.' This can only mean that the work in which the employer and employee *are jointly engaged*, as master and servant, at the time of the injury, must be an act of interstate commerce, or so closely related to interstate commerce as to be practically a part of it. Such, in effect, is the construction given to the statute by previous opinion of this Court. *Prince* v. *N., C. & St. L. Ry.*, 152 Tenn., 189; *Vaught* v. *East Tenn. & W., N., C. Ry. Co.*, 148 Tenn., 379; *Massengale* v. *Tenn. River Nav. Co.*, 146 Tenn., 248."

We are unable to escape the conclusion that the *making up and operation of this train*, carrying interstate cars of freight, was connected with and a part of interstate transportation; and that the supervision or overseeing of this yard by its foreman, including services required and being performed by him in signaling its crew to assume charge of it, was work so *closely related to interstate commerce* as to *be a part of it*. *Tennessee Railroad Co.* v. *Chitwood*, 163 Tenn., 303, is clearly distinguishable on its facts and does

not control here. The judgment must be reversed and the suit dismissed.

CHAMBLISS,
Judge.

Petitioner, Mrs. Nannie Pyle, filed a petition in the Supreme Court of the State of Tennessee, to rehear, which petition was overruled and denied on the 7th day of February, 1941. Rec., p. 33.

C. QUESTION PRESENTED.

As it was agreed by counsel representing the petitioner and the defendant in the lower courts that the deceased, Pearson Pyle, at the time of his death, was an employee of the Tennessee Central Railway Company and in line of duty, and that his salary was approximately One Hundred Fifty and No/100 ($150.00) Dollars per month, the only question presenting itself to this Honorable Court, as we view it, is strictly a legal question and is as follows:

Was the deceased, Pearson Pyle, at the time of his injury and death, engaged in interstate commerce or in work so closely related to interstate commerce as to be substantially a part thereof, or, on the other hand, was he, at that time and place, engaged solely in intrastate commerce?

D. BRIEF.

PROPOSITIONS OF FACT.

1. The deceased, Pearson Pyle, was an employee of the respondent, Tennessee Central Railway Company, and had been an employee for approximately nineteen years and at the time of his death, was drawing a salary of approximately One Hundred Fifty and No/100 ($150.00) Dollars per month. Rec., p. 12.

2. Pearson Pyle was killed on the 26th day of February, 1938, in the performance of one of his duties,—that of calling a crew for Train No. 81, one of respondent's regular freight trains, when he stepped in front of a fast moving passenger train of the C., N., O. & T. P. Railroad Company. Rec., p. 16.

3. The position of Pearson Pyle with the respondent railway company was that of "Yard Foreman" or Yard Clerk, and his duties were: To look after the engines, keep the yards clear, call out the train crew, notify the crew when their train was called to go out, and he was a clerk in the office making out reports and time slips. Rec., pp. 12 and 17.

4. The respondent, Tennessee Central Railway Company was, on the 26th day of February, 1938, operating in Roane County, Tennessee, and was engaged as a common carrier, doing interstate business, operating a line of railroad extending from Harriman, in Roane County, Tennessee, to Hopkinsville, in the State of Kentucky. Rec., pp. 2, 27, and 28.

5. The respondent, Tennessee Central Railway Company, was not operating under the terms of the Workmen's Compensation Act of the State of Tennessee, at the time of the death of Pearson Pyle, and repeatedly had refused to comply with the provisions of said act. Rec., p. 25.

6. Tennessee Central Railway Company train No. 81, for which deceased Pyle was calling a crew, was a regular freight train of defendant railway company and was made up in the yards of the company at Emory Gap, Tennessee, and contained interstate shipments. Rec., p. 23.

E. PROPOSITIONS OF LAW.

This is a suit brought by Mrs. Nannie Pyle, Administratrix of the estate of Pearson Pyle, deceased, against the Tennessee Central Railway Company under the Workmen's Compensation Statute of Tennessee, said statute being Chapter 123 of the Public Acts of Tennessee, for the year 1919 and amendments thereto.

Section 6856 of the Code of Tennessee (1932), which is a section of the Workmen's Compensation Statute, provides:

> "This chapter (123) shall not apply to: (a) Any common carrier doing interstate business while engaged in interstate commerce."

It is the insistence of the railway company that Pearson Pyle, at the time of his death, was an employee of the respondent railway company, engaged at the time, as to both the employer and the employee, in interstate commerce. Mr. Pyle was employed as yard foreman, or yard clerk, in the yards of respondent railway company at Emory Gap, Tennessee, and at the time of his death, was in the performance of one of his duties as such yard foreman or clerk. His duties were to look after the engines, keep the yards clear, call out the train crew when their trains were called to go out, make out reports and time slips. At the time of his death, he was in the performance of one of these duties, namely, calling the engineer, brakemen, and fireman for Tennessee Central Railway Company's freight train No. 81, which was a regular freight train of the Tennessee Central Railway Company, transporting interstate shipments. Rec., p. 12.

The said Employers' Liability Act, U. S. Code Title 45, Section 51, is as follows:

> "Every common carrier by railroad while engaged in commerce between any of the several states or territories . . . shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce. . . ."

As we view it, the pertinent question with which this Honorable Court will be concerned in this suit is whether the deceased, Pearson Pyle, at the time of his injury and death, was engaged in intrastate or interstate commerce, or in work so closely related to interstate commerce as to become substantially a part thereof.

The true test of employment in interstate commerce in the sense intended was pronounced by this Honorable Court in the case of *Shanks* v. *Del. L. & W. R. Co.*, 239 U. S., 556, and the rule or test, as laid down in that case has been followed by the courts in later decisions and is as follows:

> "Was the employee, at the time of the injury, engaged in interstate transportation or in work so closely related to it as to be practically a part of it?"
>
> *Shanks* v. *Del. L. & W. R. Co.*, 239 U. S., 556, 139 Tenn., 196.

> "The general test as to the character of the employment is whether the employee was engaged in an act so directly and immediately connected with interstate business as substantially to form a part or necessary incident thereof."
>
> *Hines* v. *Industrial Accident Comm.*, 184 Cal., 1, 192 P. 859, 139 Tenn., 196.

> "An employee, while actually performing a service essential to, or so closely connected with interstate commerce as to be substantially a part of it, though not necessarily exclusive of all intrastate features, is in the performance of interstate service within the meaning of the act."
>
> *Graber* v. *Duluth S. S. & A. R. Co.*, 159 Wis., 414.

> "So, one is engaged in interstate commerce, if his efforts are employed in *aiding, furthering,* or *facilitating* commerce, or are necessary to the business of the railway as an interstate carrier."
>
> *Probus* v. *Ill. C. R. Co.,* 181 Ky., p. 7.

To the same effect is our own case of *C. & O. & T. P. R. R. Co.* v. *Morgan,* 139 Tenn., p. 31.

This Honorable Court, as well as the courts in most of the states, has adopted the above rules as the true test of employment. Applying these rules to the case at bar, we most respectfully insist that the deceased Pyle, at the time of his injury and death, most certainly was engaged in work *so closely related to as to be practically a part of interstate commerce* and the work that he was doing was a necessary incident to the transportation of interstate commerce. Certainly it could not be said that his calling men to start a run, involving the movement of interstate merchandise, was not an act *aiding, furthering* or *facilitating* the shipment of the merchandise.

Movement of freight or passengers from one state to another is interstate commerce. Train No. 81, for which train the deceased was calling the trainmen preparatory to making a run from Emory Gap to Nashville, contained several cars of interstate shipments. The proof in this case shows that Train No. 81 contained interstate shipments (Rec., p. 23), and this fact is not disputed. In order for these interestate shipments to move from Emory Gap, it was necessary and essential that trainmen be called to take charge of said train and transport said shipments toward their final destination. As we view it, there could be no question but that the deceased's act in furtherance of these shipments by assembling a crew of trainmen, was so closely

connected with the actual movement of the merchandise as to be essentially a part of it. His duty, in this particular instance, *was directly connected with interstate movement of freight.*

In *Wheelock* v. *Industrial Commission,* 318 Ill., 537, the Court uses the following language:

> "It is the employment that determines whether or not the injury to the employee is within the purview of the act and not necessarily the particular act of the employee at the precise time of his injury."

In the case of *St. L., S. F. & Tr.* v. *Seale,* 229 U. S., 156, the decedent was a yard clerk and at the time of the injury and death, was on his way through the railroad yard to one of the tracks to meet an incoming train which had arrived from another state. He was going to the train to take the numbers of the cars and otherwise perform his duties in respect to them. While so engaged, he was struck by a switch engine which it was claimed was negligently operated by other employees. The Supreme Court of the United States held that the decedent was engaged in interstate commerce at the time of his death. Discussing the legal effects of the case, the Court said:

> "In our opinion, the evidence does not admit of any other view than that the case made by it was within the Federal statute. The train from Oklahoma was not only an interstate, but was engaged in the movement of interstate freight, and the duty which the deceased was performing was connected with that movement, *not indirectly and remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal* for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary for the train

> to be broken up and the cars taken to the appropriate tracks for making up outgoing trains, or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line."

It is our insistence that the thing that the railway company and the employee are engaged in at the time of the injury determines what the character of the employment is, and whether they both are, at the time of the accident, engaged in interstate or intrastate commerce. If the work engaged in is interstate commerce, then the exclusion in our statute applies and the company is not liable.

> "To take the case out of the statute the work in which the employer and employee are jointly engaged at the time of the injury must be an act of interstate commerce or so closely related thereto as to be a practical part of such commerce.
>
> *Williams* v. *Carolina, C. & O. R. Co.*, 154 Tenn. (1 Smith) 224, 289 S. W., 520, and cases cited;
>
> *Shanks* v. *Delaware, L. & W. R. Co.*, 239 U. S., 556, 60 L. Ed., 436, 36 Sup. Ct., 188, L. R. A. 1916C, 797, cited in *Prince* v. *Nashville, C. & R. Co.*, 152 Tenn. (25 Thomp.), 189, 274 S. W., 13.

The railway company, of course, was engaged in interstate commerce and the act, or acts, being performed by the deceased at the time of his injury and death, were a necessary incident or act in furtherance of the business of the employer, that being the movement of interstate shipments. The acts performed by the respondent, Tennessee Central Railway Company, could in no wise be classified as intrastate shipments, because our courts repeatedly have held that if the train contains one passenger traveling from one state to another, or one piece of merchandise in a trainload of merchandise, going from one state into another,

the whole act or movement is to be classified as interstate commerce or transportation.

> "If a train carries a single shipment, a single interstate passenger, or even an empty car destined beyond the state line, *every trainman* working thereon is engaged in interstate commerce."
>
> *P. & R. Ry.* v. *Hancock,* 253 U. C., 284.
>
> *Mappin* v. *A., T. & S. F.,* 198 Cal., 733.

For the convenience of the Court we are citing hereunder several instances in which the courts have held that the work engaged in by the employee was held to be in interstate commerce.

> "Brakeman at the time assisting in movement of intrastate car . . . movement was itself a part of interstate transportation, since the train moved *regularly every twenty-four hours* and invariably carried interstate cars."
>
> *Penn R.* v. *Morrison,* 3 F. (2nd), 986.

The thought embodied in the *Pederson* case (v. D. L. W., 229, U. S. 146) as finally ruled is that an employee who is at work on or about any instrument then in use as an instrument of interstate commerce is employed in such commerce.

> "If the act the servant was performing at the time of the accident was *incident* to interstate work, or if it was *incident* to a *whole day's work,* and partly intrastate, he is within the Federal Statute. . . . That his employment also extended to intrastate commerce, is for present purposes *of no importance.*"
>
> *Erie* v. *Winfield,* 244 U. S., 170.

> "A brakeman injured in a train containing nothing but intrastate shipments, has no remedy under the Federal Act, *but the minute* that any species of merchandise is placed in that train, *he is* engaged in interstate commerce."
>
> *U. S.* v. *C. & N. W.,* 157 Fed., 342.

"Cutting grass and weeds from along the track tends to contribute to the safety of the railroad, by preventing fires which might injure bridges, is interstate commerce."

Quirk v. *Erie*, 235 N. Y., 405.

"A plumber engaged in inspection of pipes beneath a station is within the Federal Statute."

Vollmers v. *N. Y. C.*, 180 N. P. App., 60.

"A lineman traveling by motor car to repair telegraph line to control movement of interstate train, is engaged in interstate commerce."

Charlotte Harbor Ry. v. *Truette*, 81 Fla., 152.

"Laborer shoveling snow from tracks used for *both* interstate and intrastate commerce, was engaged in interstate commerce and state statute is not applicable."

N. Y. C. v. *Porter*, 249 U. S., 168.

"Employee shot while guarding train moving both intra- and inter-state commerce during strike, held employed in interstate commerce."

A., T. & S. F. v. *Ind. Accident Comm. of Cal.*, 192 Cal., 765.

"Baggage master whose duty was to meet *both* intra- and inter-state trains, held employed by interstate commerce."

Carberry v. *D., L. & W.*, 93 N. J. L., 414.

"Employee drying sand for engine and on his way back to ash pit, injured and held to be employed in interstate commerce."

Erie v. *Szary*, 253 U. S., 86.

"Employee filling water cooler in passenger train regularly used in interstate commerce, held employed in interstate commerce."

Cassin v. *Lusk*, 277 Mo., 663.

"Porter putting ice in cooler (train had two intrastate passengers) held employed in interstate commerce."

Freeman v. *Powell,* Tex. Civil App., 144 S. W., 1033.

"Employee preparing material for lubricating engine used in both classes of commerce, held employed in interstate commerce."

Stone v. *N. Y. C.,* 211 N. Y. App., 638.

"Employee placing grate to drain water off main line, employed in interstate commerce."

L. & N. v. *Blankenship,* 199 Ala., 521.

Cantois v. *H. & S. A.,* 274 U. S., 747.

"Employee riding speeder, inspecting road, engaged in interstate commerce."

Anest v. *C. P. S. Ry.,* 89 Wash., 909.

"Operator of a hoist used to pick up rails on flat car in connection with repair work, held to be engaged in interstate commerce."

Hargrove v. *Gulf C. & S.* (Tex. App.), 202 S. W., 188.

"Timekeeper of gang repairing interstate track while on his way to send telegram on progress of work, held interstate commerce."

Crecelius v. *C., M. & St. P.,* 284 Mo., 26.

"Electric signal man returning home after inspecting last signal, on track tricycle, employed in interstate commerce."

L. & N. v. *Mullins, Admrx.,* 181 Ky., 148.

"Employee oiling pump to pump water into tank for engine in both classes, engaged in interstate commerce."

Kelly v. *Erie,* 188 N. Y. App., 863.

"Employee operating heating plant to supply heat for cars standing on tracks in yards. Employed in

interstate commerce. No separable part of the entire process.

Grueszewsky v. *Dir. General,* 96 Conn., 119.

"Painter painting shaft of elevator handling coal for both classes, held interstate commerce."

L. & N. v. *Stewarts, Admr.,* 207 Ky., 516.

"A train operating only between two points within the state and carrying merchandise only to destinations within the state, would clearly be subject to the regulatory provisions of a state act on the same subject. But if a train operating between two points within the state, carrying one or more cars billed to a foreign destination, the entire train is impressed with the qualifications of a Federal agency of interstate commerce and is subject to Federal control."

Fernette v. *Pere Marquette R. R. Co.,* 175 Mich., 653.

"This section was intended to apply to every carrier while engaging in interstate commerce and to an employee of such character while so engaged, and if these conditions occur, the fact that the carrier and the employee may also be engaged in intrastate commerce is immaterial."

Atlantic Coast Line R. R. Co. v. *Jones,* 190 Ala., 132.

ARGUMENT.

The respondent, Tennessee Central Railway Company, by and through its General Counsel, had repeatedly refused to operate under the Workmen's Compensation Statute and this statute, itself, gives the respondent the right to elect to operate under the statute or refuse so to do, had it not been expressly exempt from operating under it, by virtue of the fact that it is a common carrier doing interstate business. The respondent, by and through its General Counsel,

Walter Stokes, stated to the Court on the trial of the cause, that the Tennessee Central Railway Company had refused repeatedly to operate under the statute and attempted to go into detail in the matter and show just what steps had been taken in order to excuse itself from operating under the statute, and would have done this, had the trial judge so permitted.

The defendant, Tennessee Central Railway Company, is rated a *Class I railroad* by the Interstate Commerce Commission. It has never made any reports of any character, except corporation, to the State of Tennessee. But, instead is required, and compelled by *Federal Acts* to

Make monthly reports to the Interstate Commerce Commission, under the—

Railroad Retirement Act,

Accident Reports Act,

Boiler Inspection Act,

and special and periodical reports required by the Commission under the

Safety Appliance Acts,

16-hour law,

and this is what the witness Walter Stokes, p. 25, attempted to explain, but was precluded by objections of the petitioner.

The statute, itself, having given the railway company the right to refuse to operate under the statute, we most earnestly insist that the Circuit Court of Roane County does not and did not have the authority to place the Tennessee

Central Railway Company under the statute and force it to operate under same. The petitioner, Mrs. Pyle, does not, in any way, even so much as attempt to contradict this statement and introduces no proof whatsoever to the effect that the Tennessee Central Railway Company was operating under the terms of the Workmen's Compensation statute.

As hereinabove stated, the true test or rule, as stated by all the Courts is, "whether the employee was engaged in an act so directly and immediately connected with interstate business as substantially to form a part or necessary incident thereof." Or, "was the employee, at the time of the injury, engaged in interstate transportation or in work so closely related to it as to be practically a part of it?"

> "Commerce is movement and the work and general repair shops of a railroad and those employed in them are accessories to that movement,—indeed, are necessary to it and so are all attached to the railway company, official, clerical, or mechanical."
>
> *Ind. Acc. Com. of Calif.* v. *Payne*, 259 U. S., 182.

There could be no question but that the business the Tennessee Central Railway Company, the employer, was engaged in, was that of an interstate carrier, and as the employment determines whether or not the injury to the employee is within the purview of the act and not necessarily the particular act of the employee at the precise time of his injury, the only logical conclusion that could be reached is that the employee also was engaged in the business of interstate commerce.

Counsel representing petitioner have great respect for the holding of the Appellate Courts of the State of Illinois, and therefore, on this particular subject, we quote the following from an Illinois decision:

"It is the employment that determines whether or not the injury to the employee is within the purview of the act and not necessarily the particular act of the employee at the precise time of his injury.

Wheelock v. *Ind. Com.*, 318 Ill., 537.

Could it be said that Pyle's acts were not accessories to the movement of interstate shipments included in the freight train No. 81? We submit that this act was an act of interstate commerce. Certainly, if it could not be said that it was an act of interstate commerce, it then would have to be said that his act in calling the train crew was so closely related to interstate commerce as to be substantially a part of it. The train was necessary. It was made up almost entirely of interstate shipments. It contained cars as follows: One car going to Nashville, Tennessee, which originated at Saltville, Virginia; a car of merchandise going to Nashville, Tennessee, originating at Spencer, North Carolina; a car of salt going to Nashville, Tennessee, originating at Fort Huron, Michigan; one car going to Scottsboro, Tennessee, which originated at Whitehead, Pennsylvania; one car of pulp and one car of coal going to Old Hickory, Tennessee, which originated at Appalachian, Virginia, as shown by the testimony of R. C. Harsh in the transcript of the record, page 23, and heretofore referred to in this brief. The crew was necessary for the movement of the interstate shipments, and so, also, were the acts of deceased, Pyle, in starting the whole procedure that moved interstate shipments from the yards in Emory Gap, over which he was the foreman, to their respective determinations or destinations.

As we view it, the only logical conclusion which can be drawn from the facts of this case, as a whole, is that both the respondent and the deceased, Pyle, were engaged in

interstate commerce or acts so closely related thereto as to be substantially a part thereof, and that therefore, the respondent railway company would be exempt from the terms and conditions of the Workmen's Compensation Act of the State of Tennessee, and also that the railway company, having the right to elect and exercise that right by refusing repeatedly to operate under the terms of said Act, then, in no event, would the Circuit Court of Roane County, or any other county, have the authority to force the company to operate under the statute.

Federal Employers Liability Act . . . establishes a rule or regulation which is intended to operate uniformly in *all* the states as to *all* employees of common carriers by railroad working in interstate commerce and in that field it is both paramount and exclusive. State Workman's Compensation laws have no application to employees of common carriers by railroad, killed or injured while engaged in interstate or foreign commerce, for when *Congress legislates* concerning a subject matter of interstate commerce all state laws covering the same field are necessarily superseded by reason of the *Supremacy of the National* authority.

N. Y. C. v. *Porter,* 249 U. S., 168.
Erie v. *Winfield,* 244 U. S., 170.
Kasulka v. *L. & N.,* 213 Ala., 463.
Prince v. *N. C. & St. L.,* 152 Tenn., 189.
Carter v. *St. L. T. R. R.,* 307 Mo., 595.
Walker v. *C., I. & L. Ry.,* 66 Ind. App., 165.

The opinion of the Supreme Court of the State of Tennessee, as rendered by the very able Justice Chambliss, is in full accord with the holdings of this Honorable Court. The opinion, as we earnestly insist, properly construes Subsection A of Section 6856 of the Code of Tennessee, and Section 51, Chapter 2, Title 45 of the U. S. Code, as to

what constitutes interstate commerce as to both employer and employee.

The decision or opinion of the Supreme Court of the State of Tennessee, grants to the respondent railway company no additional provisions or immunities that were not given to it by the Workmen's Compensation Statute of the State of Tennessee or the Federal Employers Liability Act.

WHEREFORE, respondent, Tennessee Central Railway Company, respectfully submits that the petition for the writ of *certiorari* should be denied.

Respectfully submitted,

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